IN THE FRANKLIN COUNTY MUNICIPAL COURT,
COLUMBUS, OHIO

Case No. 03-190923
Filed September 15, 2004

STATE OF OHIO, CITY OF COLUMBUS,

Plaintiff,

—VS.—

SABO,

Defendant.

SENTENCE ENTRY

Jury trial held, Defendant found guilty of all charges. Court found Defendant guilty of Marked Lanes violation as well.

THE FOLLOWING SENTENCE IS IMPOSED:
FINE:

4511.19(A)(1)

$250 Fine plus court costs. Suspend $ _____ of the fine/ costs for _____.

$50 Fine including costs. Suspend $ _____ of the fine/ costs for _____.

Marked Lanes

IN ACCORDANCE WITH R.C. 2947.14, THE COURT MAKES THE FOLLOWING FINDINGS:

(✔) Per defendant's own state, he is able to pay the fine (and costs) imposed by 12-15-04.

( ) Per defendant's own statement, he/she is able to pay the fine/costs. Time payments authorized.

INCARCERATION:

180 days, Suspend 174 days, credit 3 days for time served. Length of confinement 3 days in _____. Enforcement dated 10-18-04. Balance of sentence is suspended upon the following conditions:

( ) Year(s) **Non-Reporting** probation and Provided No Convictions serious traffic offenses/criminal offenses/ same or similar offenses. Supervised by probation officer as P.N.C. status.

(1) Year(s) **Reporting** Probation.

( ) Other Conditions _____

_____

Conditions of Report and Non-Reporting Probation:

( ) No acts of violence. ( ) DV counseling. ( ) TAPP

(✔) Alcohol/Drug assessment and follow up if necessary.

( ) Stay away from _____.

( ) Community Service _____ Hours.

( ) Restitution to _____ $_____.

( ) Anger Management Counseling. (✔) 3 Day Certified Program.

( ) Case to convert to Non-Reporting probation after C/P complete.

( ) If further counseling needed refer to Judge for hearing date.

( ) Assessment for any & all counseling and follow up if necessary.

(✔) Pay fines and costs.

DRIVING PRIVILEGES SUSPENSION:

Class Type: (5), (4), (3), and (7)

1 year. Beginning dated 8-31-03.

( ) Occupational/Limited driving privileges authorized per separate entry. Effective date _____

(X) Proof of Financial Responsibility provided, clerk to notify Bureau of Motor Vehicles.

( ) Proof of Financial Responsibility not provided, clerk to notify Bureau of Motor Vehicles.

( ) Innocent owner per separate entry. ( ) Vehicle ordered immobilized _____ days per separate entry.

Dismiss -.-.-.-.-.-.-.-.

Further, _____

IT IS SO ORDERED

Appendix 1

9-15-04
DATE

/s/ PAUL M. HERBERT
JUDGE PAUL M. HERBERT

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 04AP-1114
(M.C. No. 2003 TRC 190923)
(REGULAR CALENDAR)

STATE OF OHIO,

Plaintiff-Appellee,

—v.—

NICHOLAS M. SABO,

Defendant-Appellant.

OPINION
Rendered on March 30, 2006

Richard C. Pfeiffer, Jr., City Attorney, *Steven L. McIntosh*, *Lara N. Baker*, and *Matthew A. Kanai*, for appellee.

Cleve M. Johnson, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶ 1} Shortly after 2:00 a.m., on August 31, 2003, Trooper John Johnson of the Ohio State Highway Patrol observed defendant-appellant, Nicholas M. Sabo, driving an automobile northbound on Interstate 71 in Franklin County, Ohio. The trooper witnessed defendant traveling 65 m.p.h. (which is within the posted speed limit) approximately five feet behind another vehicle. He also observed defendant weave in his lane of travel over the white edge line several times, each time by a distance of two tire widths. The trooper followed defendant for about a mile and then pulled him over. Defendant rolled down his window as the trooper approached his car. The trooper immediately detected a strong odor of alcohol about defendant; he also noted that defendant's eyes were bloodshot and glassy.

{¶ 2} Thereafter, the trooper requested that defendant exit his vehicle and be seated in the patrol car. Defendant spontaneously stated that he "could [not] afford a DUI" because he was in the process of obtaining employment with a law enforcement agency. (Tr. Vol. II, at 296.) Inside the patrol car, the trooper once again detected a strong odor of alcohol about defendant and saw that his eyes were bloodshot and glassy; he also noted that defendant's speech was slightly slurred. Upon questioning, defendant admitted that he had been drinking. Thereafter, the trooper administered two field sobriety tests, which defendant failed.

{¶ 3} Defendant was subsequently arrested and transported to a police station, where he agreed to submit to a BAC DataMaster test. The test yielded a result of .117 grams of alcohol per 210 liters of breath. Defendant was

charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1), operating a motor vehicle with a prohibited alcohol concentration in violation of R.C. 4511.19(A)(3), and failing to drive within marked lanes in violation of R.C. 4511.33.

{¶ 4} Defendant filed a motion to suppress evidence obtained from sobriety or other tests performed to determine defendant's alcohol level, including the BAC DataMaster test result of .117 and the trooper's observations or opinions regarding defendant's sobriety or alcohol levels. Following a hearing, the trial court, in a written decision filed April 7, 2004, overruled defendant's motion to suppress.

{¶ 5} The case proceeded to a jury trial in the Franklin County Municipal Court. The state presented the above cited testimony of Trooper Johnson. Defendant presented the testimony of Scott Kotterman, a police officer friend of defendant, who picked defendant up from the police station after he was released from custody. According to Mr. Kotterman, when defendant emerged from the police station, he did not appear to be under the influence of alcohol. Mr. Kotterman admitted, however, that he did not know how much defendant had to drink prior to his arrest.

{¶ 6} At the conclusion of the evidence and the end of deliberations, the jury found defendant guilty on the R.C. 4511.19(A)(1) and (A)(3) charges and the court found defendant guilty on the R.C. 4511.33 charge. At the sentencing hearing, the state elected to sentence defendant on the R.C. 4511.19(A)(1) charge rather than the R.C. 4511.19(A)(3) charge. Pursuant to a "Sentence Entry" filed September 15, 2004, the trial court sentenced defendant for violating R.C. 4511.19(A)(1) and

4511.33; no sentence was imposed on the R.C. 4511.19(A)(3) charge. Defendant was sentenced to 180 days in jail and fined $250 on the R.C. 4511.19(A)(1) charge and $50 on the R.C. 4511.33 charge. His operator's license was suspended for one year from the date of the offense. The trial court credited three days for time served and suspended 174 days of defendant's jail sentence on condition of one year probation.

{¶ 7} On appeal, defendant advances the following eight assignments of error:

> I. It was error to interpret [*State v. Vega*] in a manner that required the court to misinform to the jury about the accuracy of the breath test and that prohibited the defendant from telling the truth.
>
> II. Absent a *Vega* rationale, there was no other legitimate basis for barrning [sic] the defendant from exercising his constitutional right to litigate the only real issue in the case.
>
> III. It was error to deprive the defendant of due process of the law and his only significant defense by instructing the jury that it must believe false information about the accuracy of the breath test while simultaneously prohibiting the defendant from presenting the truth.
>
> IV. The defendant was deprived of his right to have the state prove its case and his right to confront witnesses against him when the jury was directed to believe the test even though there was no evidence that his test result was accurate.
>
> V. Neither bureaucratic fiat nor legislative edict regarding the accuracy of the test can constitution-

ally deprive a defendant of his right to a judicial determination as to the weight of the evidence.

VI. The rules of evidence do not trump the Constitution. By prohibiting the defendant from asserting his innocence and presenting his only significant defense, the court deprived the defendant of his right to a trial by jury.

VII. Because there was no proof that the testing machine was accurate, either an unconstitutional conclusive presumption substituted for proof or there was a failure of proof.

VIII. Because the facts giving rise to the presumption where [sic] presented only in a suppression hearing and established only by only a preponderance of the evidence, the resulting trial presumption that the test was accurate did not meet the beyond a reasonable doubt standard.

{¶ 8} As defendant's assignments of error are interrelated, we will address them together. Defendant contends the trial court erred in refusing to admit expert testimony at trial as to how the BAC DataMaster test results could be adversely affected if a person has gastroesophageal reflux disease ("GERD").

{¶ 9} During opening statement, defense counsel, in discussing the Ohio Department of Health ("ODH") regulation mandating the analysis of deep lung (alveolar) air for purposes of determining whether a person has a prohibited breath alcohol concentration (see Ohio Adm.Code 3701-53-02), asserted that alcohol fumes brought up from the stomach into the mouth of a person suffering from GERD could contaminate deep lung air, causing an inaccurate reading of the person's actual breath alcohol by the BAC DataMaster. The prosecutor

objected to further discussion of this issue on grounds that, absent evidence presented at trial that defendant actually had GERD, the issue was irrelevant.

{¶ 10} In response, defense counsel averred that the issue was relevant to his defense theory that existing ODH testing procedures requiring administration of only one breath alcohol test are insufficient to ensure that only deep lung air is sampled. Defense counsel asserted that, in support of this theory, he planned to call an expert witness who would testify that "the basic [ODH] testing procedure is flawed" because "in every case you should do two tests" and that "scientifically, if you don't give two tests, you're not doing a good job of determining whether that air is alveolar air or whether it's air coming from somewhere else, and the procedure was flawed." (Tr. Vol. I, at 205, 206-207.) Defense counsel further asserted that the expert would testify that a person who regularly takes Tums or Zantac is likely to suffer from GERD, that the use of dip (chewing tobacco) causes or exacerbates the condition, and that GERD could be ruled out as a possible source of adverse test results through standardized administration of two breath alcohol tests followed by a comparison of the results. Defense counsel further stated that he planned to call a fact witness to testify that defendant regularly uses dip and takes Zantac and Tums.

{¶ 11} The trial court first noted that defense counsel had not raised the GERD issue at the hearing on the motion to suppress. The court further noted the distinction between run of the mill acid indigestion and the medically diagnosed condition known as GERD. To that end, the court ruled that defendant's expert would not be permitted to express an opinion as to whether or not defendant had GERD. In response, defense counsel indi-

cated that the expert would not testify specifically about defendant; rather, the expert would testify only "in the abstract" as to the relationship of Tums, Zantac, and dip to GERD and the possible effects of GERD on breath alcohol tests. (Tr. Vol. I, at 209.)

{¶ 12} The prosecution argued that the proposed testimony presented both an improper challenge to defendant's specific test results (because there would be no direct evidence that defendant suffered from GERD or used dip, Zantac, and Tums), as well as an improper challenge to the general reliability of the BAC DataMaster. Defense counsel maintained that he did not intend to argue that the BAC DataMaster machine itself was unreliable; rather, he intended to argue only that ODH testing procedures requiring only one breath alcohol test are inadequate to rule out the possibility of GERD. Defense counsel argued that the proposed testimony went to the weight rather than the admissibility of defendant's breath alcohol test and, therefore, should be admitted at trial. As such, argued defense counsel, GERD was a proper subject for opening statement.

{¶ 13} With the court's permission, defendant filed a written proffer indicating that, if permitted, he would have presented the following evidence. Dr. Alfred E. Staubus, Professor Emeritus of Pharmacology at The Ohio State University, would state that he was very familiar with the BAC DataMaster used in the instant case. He would hypothesize that, if he were testing a person's breath alcohol level and knew that the person regularly used Zantac, Tums, and dip, he would be suspicious that the person had GERD because dip can cause or exacerbate the condition, and Tums and Zantac are commonly used to treat the symptoms associated with GERD. Dr. Staubus would acknowledge that Tums can

be used to prevent osteoporosis; however, he would state that there is normally no reason to take Zantac other than to treat GERD. Dr. Staubus would further state that a person could have GERD or a GERD episode without knowing it, as oftentimes the condition is not manifested through pain or other unusual physical sensations. He would further aver that alcohol fumes brought up from the stomach into the mouth of a person with GERD could contaminate the deep lung air sampled during a breath alcohol test, causing an inaccurate reading of the person's actual breath alcohol level. He would further opine that it would not be necessary to see someone belch or burp during a test to trigger a concern about the test result.

{¶ 14} Dr. Staubus would opine that the best way to protect against this type of false reading is to administer two tests, separated by a waiting period, followed by a comparison of the test results. Dr. Staubus would aver that this dual testing procedure was adopted in 1986 by the National Safety Counsel's Committee On Alcohol and Other Drugs Subcommittee on Technology.[1] He would further opine that failure to adopt the dual testing approach virtually "guarantees that a significant percentage of the people tested in this state will generate false readings," as GERD is a common condition. (Proffer, at 5.) Accordingly, he concluded that performing only a single test is scientifically unacceptable in every case.

{¶ 15} Further, Mr. Kotterman would testify that he had been defendant's roommate for some time and often observed defendant taking Tums and Zantac and using dip.

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[1] A copy of the report adopting the dual testing procedure is attached to the written proffer and is incorporated by reference therein.

{¶ 16} After reviewing the proffer, the trial court precluded the proposed testimony based on the Ohio Supreme Court's holding in *State v. Vega* (1984), 12 Ohio St.3d 185, discussed below. More particularly, the trial court excluded defendant's challenge to his specific test based on a lack of evidentiary support for that challenge while separately excluding the challenge to the general reliability of the testing procedure. The trial court noted initially:

> There are many different ways of attacking * * * the defendant's specific test. But the proffered testimony of defense counsel in this case seems clear to me that defense counsel intends on attacking the general reliability of the test and not the specific test result in this case because he can't produce any evidence * * * that goes to this specific event and this specific test.
>
> There's some nebulous thoughts about a possible acid reflux reaction that the defendant may have had that might have caused this specific test to be unreliable; however, the defense's argument is so tenuous that I believe I would be going against Ohio law to permit any discussions of any nature with regard to the lines of argument that defense counsel has thus presented. And, therefore, for those reasons, I'm again going to sustain the objection by the prosecutor and I'm not going to allow your expert to challenge the reliability of the breath-testing machine.

(Tr. Vol. I, at 226.)

{¶ 17} In its final ruling on the issue, the trial court further distinguished between specific and general challenges to the breath alcohol test:

> * * * [A]m I going to allow you to make any comments to the jury with regard to this specific test? The answer to that question is no. * * * [Y]ou've proffered, I think, a great deal of information to me about—and I've asked you questions about what you would intend the evidence to show in this case, and there is not any testimony that's going to come forward that would be relevant to the specific test. So I am not going to allow you to make any comment with regard to this specific test result nor would I allow your expert to testify with regard to the reliability, general reliability of these machines. * * *

(Tr. Vol. I, at 230.)

{¶ 18} R.C. 4511.19 is a strict liability statute. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3, citing *State v. Cleary* (1986), 22 Ohio St.3d 198, 199. In R.C. 4511.19(A)(3), the General Assembly defined an alcohol limit at which a person can no longer drive without posing a substantial danger to himself and others. *State v. Tanner* (1984), 15 Ohio St.3d 1, 6. When determining whether a defendant committed the "per se" offense set forth in R.C. 4511.19(A)(3), the trier of fact is not required to find that the defendant operated a motor vehicle while under the influence of alcohol or drugs; rather, the trier of fact must find only that the defendant's chemical test reading was at the proscribed level and that the defendant operated a motor vehicle within the state. *Kretz,* supra, citing *Newark v. Lucas* (1988), 40 Ohio St.3d 100, 103. As such, the accuracy of the test results is a critical issue in determining a defendant's guilt or innocence. *Kretz,* supra.

{¶ 19} The admissibility in evidence of test results offered to establish a defendant's level of alcohol concentration under R.C. 4511.19 turns on substantial com-

pliance with ODH regulations. Id. The General Assembly has determined that results of breath alcohol tests are reliable evidence when administered in accordance with ODH regulations. *Vega,* supra, at 188. Accordingly, the Ohio Supreme Court has determined that, while a defendant may not use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath testing machines, a defendant may attack the reliability of the specific testing procedure and may submit expert testimony as to testing procedures going to weight rather than admissibility. Id. at 189. See, also, *Tanner,* supra ("[a] defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels"), and *Whitehall v. Weese* (Oct. 17, 1995), Franklin App. No. 95APC02-169 ("while a defendant 'may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood-alcohol levels, he may challenge the accuracy of his specific test result.' " Id., quoting *Columbus v. Day* (1985), 24 Ohio App.3d 173, 174.

{¶ 20} Defendant contends the trial court misconstrued his argument as presenting a challenge only to the general reliability of the legislatively determined testing procedure. Defendant maintains that his proffered testimony presents a challenge to the reliability of his specific testing procedure, i.e., "the machine was unreliable in the narrow and specific instance where a single test was given to a person potentially suffering from GERD." Defendant argues that "a problem testing GERD victims is not the same thing as saying that the machine is generally unreliable" and that such a challenge is proper under *Vega.*

{¶ 21} As previously noted, the trial court indicated that it excluded defendant's challenge to the accuracy of his specific test results based on a lack of evidentiary support while separately excluding the challenge to the general accuracy of the testing procedure. We cannot find that the trial court erred in this regard.

{¶ 22} As noted by the state, the difficulty in this case is that defense counsel attempted to challenge defendant's specific test result through argument and proffered testimony, which, in essence, challenged the general reliability of the testing procedure. Argument and testimony that, on the night in question, defendant experienced an episode of GERD and that the presence of regurgitated alcohol could have interfered with his test result might have presented a challenge to the reliability of defendant's specific test results. However, defense counsel at no point indicated that testimony would be offered at trial to establish that defendant experienced an episode of GERD at the time he took the breath alcohol test or that he even had the condition. Indeed, defense counsel admitted that Dr. Staubus would testify only "in the abstract" about the possible effects of GERD on breath alcohol tests and that neither defendant nor a medical professional would testify that defendant had GERD. Thus, to the extent defense counsel's argument and the proffered testimony could be viewed as presenting a challenge to the reliability of defendant's specific test results, we find that the trial court properly excluded the testimony based on a lack of evidentiary support.

{¶ 23} In essence, argument and testimony that the "basic testing procedure" is flawed in "every case" and that a single test is never scientifically reliable is an attack on the general reliability of the testing procedure,

not an attack on a specific test. The trial court properly concluded that such a challenge is precluded *by Vega*.

{¶ 24} Defendant asserts that a decision in favor of the state on this issue poses a potential conflict with a recent case decided by the Sixth District Court of Appeals, *State v. Durnwald,* 163 Ohio App.3d 361, 2005-Ohio-4867. We disagree.

{¶ 25} In *Durnwald,* the defendant was arrested after committing several traffic violations and failing two sobriety tests. Defendant submitted to a BAC Data-Master test, the results of which established a breath alcohol content of .22. The defendant was subsequently charged with operating a vehicle under the influence of alcohol and operating a motor vehicle with a prohibited alcohol concentration.

{¶ 26} At trial, the defendant offered testimony from persons with whom he socialized prior to his stop and arrest, that he consumed five light beers in the five hours prior to his stop and arrest, and did not appear to be under the influence of alcohol at any time prior to the arrest. Defendant corroborated the five beers in five hours testimony and further testified that he had snuff (chewing tobacco) in his lip at the time of the stop. He further testified that he suffered from and took prescription medication for acid reflux, that the acid reflux condition flared up when he was nervous, causing him to burp and hiccup, that he was nervous while talking to the arresting officer, and that at the time he took the BAC test he burped and hiccupped.

{¶ 27} During trial, the defendant sought to introduce expert testimony from Dr. Staubus to describe the actions and level of impairment exhibited by a person with a .22 BAC test level compared to the defendant's

behavior and to testify about how the BAC test results could be affected if a person has GERD. The trial court denied admission of the expert testimony as to the impairment comparison, but permitted limited testimony as to the effects of GERD. The defendant then proffered in an affidavit as to Dr. Staubus's proposed testimony.

{¶ 28} In *Durnwald*, Dr. Staubus ultimately testified that, hypothetically, a person of the defendant's height and weight should have tested in a range of equal to or less than .02. He opined that, for a person of the defendant's height and weight to test at .22 under the facts presented, that person would have had to consume considerably more than five light beers. Dr. Staubus further testified that persons who suffer from GERD have excess burping which, if occurring at the time of taking the breath alcohol test, could cause an inaccurate reading of the person's actual breath alcohol by the Data-Master machine.

{¶ 29} On appeal, defendant argued that the trial court improperly limited Dr. Staubus's testimony as to the impairment comparison. The state did not cross-appeal the admission of the GERD testimony; as such, the court of appeals had no occasion to address the propriety of that admission. The court merely noted, incidentally, that "Dr. Staubus's testimony was ultimately permitted regarding the effects of GERD on the BAC tests results because the court deemed it pertinent to the per se charge." *Durnwald*, at ¶ 50.

{¶ 30} Further, the instant case is factually distinguishable from *Durnwald*. As noted, the defendant in *Durnwald* testified that he suffered from and took prescription medication for GERD. He also testified that the condition flared up when he was nervous, which caused him to hiccup and burp, and that he was nervous and hic-

cupped and burped when he was taking the test. In contrast, defendant provided no evidence in the instant case that he actually suffered from GERD, other than that he took non-prescription Zantac, or that he burped or hiccupped or was otherwise suffering from GERD at the time he took the DataMaster test. Because the factual foundation underlying the admission of Dr. Staubus's testimony in *Durnwald* was considerably more substantial than the speculative foundation of the instant case, we find that the two cases are clearly distinguishable.

{¶ 31} Finally, we note that the *Durnwald* case stands for a different proposition than that asserted in the instant case. In *Durnwald,* the court noted that "Dr. Staubus was not, however, permitted to testify regarding the *expected behavior* of someone who tested at 0.22 BAC level, *for the purposes of refuting the R.C. 4511.19(A)(1) impairment charge.*" (Emphasis added.) Id. In the instant case, defendant did not argue that Dr. Staubus's testimony should be admitted for the purpose of refuting the R.C. 4511.19(A)(1) impairment charge. Rather, defendant sought to introduce Dr. Staubus's testimony for the sole purpose of refuting the R.C. 4511.19(A)(3) charge. Indeed, on appeal, defendant does not address or present any argument regarding his conviction under R.C. 4511.19(A)(1). Thus, *Durnwald* is inapposite.

{¶ 32} We now turn to defendant's remaining arguments. Defendant first contends that *Vega is* inapplicable to the instant case because: (1) the statute construed in *Vega* established a rebuttable presumption and the statute establishes a "per se" offense; (2) the scientific conclusions upon which *Vega* was based were offered by an ODH expert who was subsequently fired for giving

false testimony; and (3) the breath testing device used in *Vega is* different from the one used in the instant case. Defendant next contends that *Vega is* "confusing" and urges this court to "clarify" it. Finally, defendant asserts that the trial court's application of *Vega* violated several constitutional principles, including the right to due process, the right to confront one's accusers, the right to a jury determination of guilt, the right to present a complete defense, and the prohibition against conclusive presumptions in criminal cases.

{¶ 33} We note, initially, that defendant failed to raise any of these arguments in the trial court, resulting in a waiver of all but plain error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists only where there is a deviation from a legal rule, the error constitutes an "obvious" defect in the trial proceeding, and the error affected the defendant's "substantial rights." *Barnes,* at 27. Crim.R. 52(B) does not require an appellate court to correct a forfeited error, even if it satisfies all three of these prongs, as the rule states only that a reviewing court "may" notice plain errors. Id. Accordingly, plain error is recognized " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 34} We decline to find plain error in this case. Defendant's arguments regarding the inapplicability of *Vega* are without merit. In *Tanner,* supra, the Ohio Supreme Court applied *Vega* to the then recently enacted "per se" statute. The qualifications of a former ODH director and the ODH's decision to change breath testing

machines are irrelevant to the instant case. Further, we decline defendant's invitation to "clarify" *Vega*. As we have previously noted, "this court is charged with accepting and enforcing the law promulgated by the Ohio Supreme Court, not changing, modifying or ignoring that law." *State v. Miskel* (Mar. 28, 2000), Franklin App. No. 99AP-482, quoting *Columbus v. Duling* (Mar. 31, 1997), Franklin App. No. 96APC07-859. Finally, this court has previously rejected defendant's constitutional challenges. In *State v. Eberts* (Sept. 26, 2000), Franklin App. No. 99AP-1327, we stated:

> * * * [I]n *Columbus v. Duling* * * *, we declined to embrace a defendant's argument that the trial court violated his constitutional rights when it precluded him from attacking the general reliability of a breath test machine. In so declining, we indicated that "[a]ny change in the law regarding a defendant's right to challenge the general scientific reliability of a breath testing device must come from the Ohio Supreme Court, not this court."

See, also, *Miskel*, supra.

{¶35} For the foregoing reasons, we overrule all eight of defendant's assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 04AP-1114
(M.C. No. 2003 TRC 190923)
Filed March 30, 2006
(REGULAR CALENDAR)

STATE OF OHIO,

Plaintiff-Appellee,

—v.—

NICHOLAS M. SABO,

Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 30, 2006, defendant's eight assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs are assessed against defendant.

BROWN, BRYANT & FRENCH, JJ.

/s/ SUSAN BROWN
Judge Susan Brown

THE SUPREME COURT OF OHIO

Case No. 06-946
Filed August 23, 2006

STATE OF OHIO

v.

NICHOLAS M. SABO

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 04AP1114)

/s/ THOMAS J. MOYER

THOMAS J. MOYER
Chief Justice

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

Case No. 2003 TRC 190923
Filed April 7, 2004
Judge Herbert

STATE OF OHIO,

Plaintiff,

—v.—

NICHOLAS M. SABO,

Defendant.

DECISION

The defendant properly filed his motions to suppress evidence on September 11, 2003 and on September 17, 2003. A hearing was held on February 3, 2004 on the merits of the motions filed. The state bears the burden of proof including the burden of going forward. The burden of proof on a motion to suppress evidence is by a preponderance of the evidence.

The defendant set forth four separate arguments for the suppression of the state's evidence. The defendant first asserts that he had chewing gum in his mouth at the time of the breath test in violation of Ohio Adm. Code Sec. 3701-53-02 and well established case law.

The arresting officer, Trooper Johnson, indicated that the defendant was continually in his presence from the time of arrest until the administration of the breath test. A period longer than twenty (20) minutes. Trooper Johnson testified the defendant did not place anything in his mouth, nor could he have had access to any object and did not notice anything in defendant's mouth. Additionally, the Trooper had an opportunity to talk with the defendant and observe him in the front seat of the cruiser. It might have been possible for defendant to serptitiously secret chewing gum in a far reaching oral cavity for the sole purpose of causing a violation of Ohio Adm. Code Sec. 3701-53-02 and thus a suppression, however, this is not probable. The defendant was readily discussing and seemed wholly concerned about what affect this incident might have upon his possible future employment as a law enforcement officer. The court did not note any nefarious attempt by the defendant to conceal chewing gum. The evidence instead pointed to an affable and cooperative subject who was willing to comply with the requests of law enforcement. There was also no negligence on the part of law enforcement in that they overlooked to investigate this critical requirement of the law.

The defendant called a credible witness who directly contradicted the state's position regarding this issue. Defendant's witness testified that the chewing gum was the first thing he noticed when he picked up his friend at the police station. The witness also indicated the defendant said that the chewing gum was in defendant's mouth during the entire time.

The court finds that the state has met its burden by a preponderance of the evidence that the state substantially complied with Ohio Adm. Code Sec. 3701-53-02.

The defendant next asserts that rubber stamps are not sufficient to properly credential an officer to administer breath tests in Ohio. The court does not agree. The officers testified that they took the proper course work and passed the same by the Ohio Department of Health. They testified they received qualification as senior operators and that these credentials were in effect on the day they performed the test that is the subject of the instant motion.

The court believes the witnesses testimony alone is sufficient to meet the state's burden that they are qualified to administer the tests that were performed on the day in question. The court additionally agrees with the state's position regarding the admission of the certificates. The officers are qualified to testify that they received those certificates and what those certificates represent. The defendant's objection to the exclusion of the certificates is hereby overruled.

The defendant thirdly urges the court to suppress the results of the breath test in the instant case due to the fact that Ohio Adm. Code Sec. 3701-53-09(C) was amended to require an annual renewal of senior operator's licenses. The previous period was two years. The issue is what effect the change in the permit's length would be on otherwise valid senior operator's permits.

The issue was exhaustively and previously considered by this court in *State of Ohio v. Timothy Bechtel, Case No. 2003 TRC 192513*. The *Bechtel* decision is directly on point even sharing the same senior operator's license of the same trooper, Trooper Bee. Judge Schneider, in his well reasoned decision, cited authority in determining that if a statue or regulation is to be applied retroactively it must first pass a two-part test. First, whether the law specifically states that it should apply retroactively and if so, secondly, whether the regulation takes away or

impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

Ohio Adm. Code Sec. 3701-53-09(C) states,

> Permits issued under paragraph (A) and (B) of this rule shall expire one year from the date issued, unless revoked prior to the expiration date. An individual holding a permit may seek renewal of an issue permit by the director. . . by filing an application. . . The director shall not renew the permit if the permit holder is in proceedings for revocation. . .

There is no language or express intent in this regulation to apply the one year expiration date retroactively. Therefore, absent a clear indication that this regulation should apply retroactively, permits with a two year expiration date are valid through the indicated date on the certificate. All permits issued after the enactment of this regulation will be valid for only one year. Because the regulation does not state that the amendments should apply retroactively, there is no need to go on to the second part of the test.

Defendant's final argument for the suppression of the evidence appears to be that the checklists used during the breath test are improper due to the fact they are not set forth specifically in OAC sec. 3701-53-02.

Section 3701-53-02(C) reads:

> (C) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraphs (A) and (B) of this rule. Breath samples shall be analyzed according to the operational checklist for the

> instrument being used and checklist forms recording the results of subject tests shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code. The results shall be recorded on forms prescribed by the director of health.

Defendant asserts that due to the fact that the forms could be now changed at the whim of a health department employee, that important procedures could be left out for testing such as the requirement of observing the defendant for twenty (20) minutes prior to testing.

Although defendant's argument may have some validity, the court finds that forms are useful to insure compliance with legal requirements, however are no substitute for actual compliance or substantial compliance. In other words, if on the operational checklist the box was checked that the subject was observed for twenty (20) minutes prior to testing, yet testimony was elicited that the subject had been observed for only ten (10) minutes, it is obvious the test must be suppressed. However, if the officer neglected to check the first box on the checklist yet credibly testified he observed the subject for longer than twenty (20) minutes, although this would amount to a serious question, it might not necessitate the suppression of the test.

Nevertheless, this court finds that the Trooper's testimony regarding the procedures used during the instant breath test to be in substantial compliance with the law and requirements of Ohio. Furthermore, the court finds the checklist to be relevant to this hearing and its probative value outweighs any prejudicial value. Therefore, it shall be admitted for the purpose of this hearing.

Defendant did not mention in his written briefs any objection to the probable cause for the stop of the vehicle. Nevertheless, there was testimony and discussion

regarding this issue. The court finds that the defendant was following too close to another vehicle as well as the cited offense of a lane violation which gives ample reason to warrant the institution of a traffic stop.

Based upon the foregoing, defendant's motion to suppress is hereby overruled.

/s/ PAUL M. HERBERT
Judge Paul M. Herbert

NOTICE DATED: April 6, 2004

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IN THE MUNICIPAL COURT FOR
FRANKLIN COUNTY, OHIO,
CRIMINAL DIVISION

Case no.: 2003 TR C 190923
JUDGE HERBERT

STATE OF OHIO

Plaintiff

—vs.—

NICHOLAS M. SABO

Defendant

PROFFER

Now comes the defendant and hereby proffers the following testimony:

Had this case proceeded, the defendant would have adduced the following testimony and would also have referred to such anticipated testimony in his opening statement:

The defendant would called Dr. Alfred E. Staubus as an expert witness. Dr. Staubus has a doctorate in pharmacy and is a Professor Emeritus of Pharmacology at the Ohio State University and has testified many times as an expert in both civil and criminal cases for both the plaintiff and the defense. Testimony would have been adduced

qualifying Dr. Staubus as an expert in pharmacology, anatomy, physiology, and alcohol and drug testing. He would have vouched for the credentials attached to and incorporated into this stipulation.

All of the matters testified to by Dr. Staubus would be based upon reliable scientific, technical, or other specialized information and be true to a reasonable degree of scientific certainty. Dr. Staubus would testify that he is very familiar with the breath testing device used in this case, that he has used them for years, and in fact currently owns and uses these machines. He believes that such machines work and are accurate from a scientific prospective if they are used properly. Likewise, Dr. Staubus would testify that he is well acquainted with the information contained in the attached articles and he would testify to all of the matters set forth therein. Said articles are also hereby incorporated by reference into this proffer.

Q As a scientist, if you were testing the breath of a subject for alcohol and you knew that the subject regularly used Zantac, Tums, and used dip, would that have any significance to you?

A If someone took these things, I would be very suspicious that the person had gastroesophageal reflux disease [hereinafter GERD]. Zantac and Tums are commonly taken for this and dip can cause or exacerbate this. In fact, Zantac is used primarily for this purpose. Zantac is not a drug of abuse and there is normally no other reason to take such medication other than to treat GERD. While Tums can be taken for osteoporosis, Zantac is not helpful for osteoporosis.

Q What is dip.

A Dip is tobacco that is taken orally. The saliva from the mouth will combine with the tobacco that will be swallowed and act as an irritant to the gastrointestinal system. It can both cause and exacerbate GERD.

Q What is GERD?

A GERD results from a defect in the valve between stomach and esophagus. It causes stomach gases and fluid to escape from the stomach and travel all or part of the way up into the throat or mouth. The stomach acids then irritate the non stomach tissue which is not constructed so as to be resistant to such acids.

Q Is there a common name for this?

A Heartburn, nervous stomach.

Q Does someone with GERD always know that they have the condition generally.

A No. Sometimes there is no pain involved with this condition. It can present as a cough or as trouble speaking without the common heartburn type symptoms.

Q Does someone who knows generally that they have GERD always know when they are having a GERD episode.

A No. As I said, sometimes there is no pain or other sensation.

Q Could a doctor be sitting next to the person and not know that a GERD episode was occurring.

A Yes. This diagnosis is normally made by using a scope to look at the person's esophageal track. Normally scarring or damage to the tissue is what is looked for. If the scope is not inside the esophagus at the time that the reflux is occurring, it could quite

easily be undetectable even to a physician directly observing the subject with GERD.

Q Could someone with GERD have a strong odor of alcohol about them?

A Yes. If there was alcohol in the stomach being forced up the esophagus, the smell from this alcohol evaporating from the throat tissues would combine with the air from the alcohol in the lungs and result in a stronger odor than if it were coming from the lungs alone. If you have ever been around someone who has vomited recently, you know that you get a distinct odor from that. Reflux is similar to that. If alcohol was in the stomach there would be an alcohol smell.

Q What does GERD have to do with breath testing?

A. It can cause false readings. The breath test is only accurate if the sample is taken from deep lung or alveolar air. GERD causes the deep lung air to be contaminated by alcohol suspended in air in stomach gas and alcohol evaporating off of throat and mouth tissues.

Q This sounds like such a small amount of alcohol, is this really significant?

A Yes. keep in mind that we are measuring alcohol suspended in air to begin with. The amounts involved are small to begin with, so a small contamination can have a very significant effect.

Q Scientifically, would it be good practice to inquire whether someone takes these types of medications.

A Yes

Q Is there a mechanism in the machine which is supposed to detect and prevent such false readings?

A Yes

Q Are you familiar with the Ohio Department of Health rules and regulations?

A Yes

Q Is there a rule regarding deep lung or alveolar air?

A Yes

Q Are you familiar with the ODH operator's checklist for the operation of the Datamaster?

A Yes

Q Is there a provision regarding a 20 minute waiting period before testing?

A Yes

Q Are you familiar with a memorandum sent by the Ohio Department of Health testing stations regarding waiting 20 minutes following an invalid sample reading during a test?

A Yes

Q Why is this waiting period necessary?

A If alcohol where to get into the subject's throat or mouth within 20 minutes before the test. This could cause a false test reading.

Q But didn't you just tell us that there is a mechanism in the machine which is supposed to prevent this. Why would a waiting period be necessary if the machine has this built in protection?

A The plain truth is that this mechanism is not perfect. Sometimes the machine can tell if air is coming from

deep in the lung and sometimes it cannot. Both the Ohio Department of Health and the manufacturer admit this and that is the reason for the rule.

Q Have you personally witnessed this sort of false reading happening?

A Yes.

Q Now when you were doing this, would you have known that this test had a false reading if you had not done more than one test?

A No.

Q So would an officer in the field dong a single test know he was getting a false reading?

A No. In a single test, the machine would do nothing to make the officer suspicious.

Q Does it make any difference if the alcohol comes from the mouth down or the stomach up?

A It can affect the test either way.

Q Is there anything that can be done to protect against this sort of false reading?

A Yes, there is a very simple technique. You simply do more than one test with a waiting period in between. You then compare results. If there is a significant difference between the results, you know that there was a false reading. Deep lung air is more stable than stomach gas and alcohol evaporating from throat and mouth tissues. Because of this the degree of contamination is more likely to vary. If it does, this variance can be detected by comparing the test results.

Q Have any scientific organizations looked at this issue?

A Yes, the National Safety Counsel's Committee On Alcohol and Other Drugs has adopted the October 1986 report of the Technology Subcommittee which made this dual testing recommendation. [this report is also attached and incorporated into this proffer].

Q Does testing the machine against a known sample of alcohol once a week do anything to protect against these false readings?

A Testing the machine like that is a good idea, but it does absolutely nothing to check whether the machine can tell the difference between deep lung air and contaminated air.

Q Why is that? Is there a difference between testing alcohol in a bottle and alcohol in a person?

A There is a big difference between testing alcohol in a bottle and alcohol in a person. There are many complex mathematical curves that the machine must evaluate to determine if the sample is deep lung air. This is a very tricky business scientifically speaking. This complex interaction of variables is not necessary when analyzing a uniform sample from a bottle and errors are much less likely.

Q Could you give us an analogy.

A The so-called instrument checks referred to in the regulations perform a function similar to checking the gas tank of a car to make sure the engine will start. While the car certainly will not start if it is out of gas, verifying that there is gas does not guarantee that the car will start.

Q How about the machine's self diagnostic mechanism. Doesn't that make sure that no false readings are obtained?

A That is also a good test to perform, but again, it does not perform any sort of test on deep lung air as opposed to air from other sources. If fact, no alcohol at all is tested in this self diagnostic test. It is mainly just a test of some of the internal electrical components to make sure they have not failed.

The problem of isolating deep lung air is one that may not be able to be solved by machine design. It is a very difficult problem scientifically. That is why both the manufacturer in the operator's manual and the Department of Health require the waiting period. If the slope detector worked perfectly, there would be no need for such a procedure. The fact that it exists is proof that it does not.

Q Is the machine ever checked to see if the mechanism that checks for deep lung air is working?

A There is no procedure in place that does this.

Q Would you have to see someone belch or burp during a test in order to have a concern about the test result.

A No. These things can be inaudible, and you can't see alcohol evaporating from tissue within the body.

Q How widespread is GERD.

A It is very common. That is why dual testing is so important. Failure to adopt this approach guarantees that a significant percentage of the people tested in this state will generate false readings.

Q If someone did actually have a .117 alcohol level in their system, would they be at the mental confusion stage with this level?

A Most people would not be.

Q Is a single test of someone who uses Zantac and Tums scientifically acceptable?

A No

Q Is a single test of anyone scientifically acceptable?

A No.

The defense would also call as a witness Scott P. Kotterman who is and was a police officer and at the time of the offense in the case at bar was and had been the defendant's roommate for some time. Mr. Kotterman would testify that before after and during the period of time period of time during which the offense in the case at bar occurred, the defendant frequently consumed Zantac, Tums, and dip. He would also testify that in both his personal and professional opinion, the defendant was not under the influence of alcohol when he picked him up at the police station immediately after he took the breath test.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served on Cynthia Seckerson, Assistant Columbus City Prosecutor, attorney for plaintiff, 375 South High Street, Columbus, Ohio 43215, on September 2, 2004 by delivery.

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Excerpts of Trial Transcript

[201] Why am I telling you this? Obviously, he wasn't sitting there drinking at the time that the officer was trying to give him the test. Well, the importance of that is, there's more than one way alcohol can get into your mouth, your throat, and your system. One way is, certainly, if it comes from the mouth down; but another way is if it comes from the stomach up. If you have—

MS. SECKERSON: Your Honor, I'm going to object at this point and ask for a sidebar.

* * *

[252] of reliability. The Court allowed, over the objection by **[253]** the prosecutor, the displaying of a poster-size board that asked the jurors how reliable they felt breath machines are in Ohio. And no authority was given at that point in time for the objection, but the Court later learned on its own that the State v Vega case and its progeny, including several decisions here in the Tenth District, indicate that once the breath test has passed the motion to suppress, that the general reliability of breath tests are not allowed to be discussed in front of the jury. So any discussion with regard to that was in violation of the well-settled law of Ohio. And Vega was decided in 1984.

* * *

[256] Now, the next issue, have you had a chance to read the proffer that was filed by defense counsel of his expert?

MS. SECKERSON: Your Honor, I believe Miss Cox has had a chance to read it. I have not had a chance to read it.

THE COURT: All right. I have read it. And in reviewing what the proffer is, along with other statements [257] being made by counsel, I'm prepared to make a decision at this point in time with regard to the admissibility of intended evidence that the defense has indicated they plan on calling.

Now, pursuant to the Columbus versus Day case, "It is well-settled that a defendant may not use expert testimony to attack the general reliability of Intoxilyzers as valid, reliable breath-testing machines; however, while a defendant may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood-alcohol levels, he may challenge the accuracy of his specific test result."

The defendant in this case plans on attacking the specific result by calling a witness that will say that he's observed the defendant taking antacids as well as Zantac and use a tobacco product in his mouth. He also plans on calling a witness that will say he observed the defendant at a certain time period after the arrest, and he did not appear intoxicated to him. And I also know that this witness is a police officer who's been trained to observe these type of characteristics of individuals.

The facts of the Weese case, in which defense counsel was the attorney on the appeal, indicate that at that trial, if the Court would have allowed the evidence he intended to bring in, evidence that the particular machine [258] used in this case had previously malfunctioned and had been subject to various repairs, that an expert, Dr. Alfred Staubus, would testify that if a person tested at a .139 level, if that person was not an alcoholic and if that person did not exhibit the symptoms of intoxication appropriate for an .139 level, then it would be a likely conclusion that something went awry with the testing process; that the defendant's girl friend would

testify that she was with the defendant on the night of his arrest and that did he not exhibit the symptoms of intoxication enumerated by the defendant's expert, Dr. Staubus. Additionally, that the defendant will testify himself that he did not exhibit the symptoms of intoxication enumerated by the expert. In addition to that, the defendant's employer would testify that the defendant has never exhibited symptoms of being an alcoholic as enumerated by Dr. Staubus. And in addition to that, the defense would have extensively cross-examined the arresting officer and any other officers who saw the defendant on the night of his arrest regarding the presence or lack of symptoms expected to be associated with one testing at a .139 level as enumerated by Dr. Staubus.

Now, the testimony that was proffered by Dr. Staubus mainly centers around the testimony of—or the hypothetical situation that the defendant has an acid reflux **[259]** condition, not anything to do with whether or not the specific test—not that the specific concentration of alcohol in his blood at the time wasn't correct, but that if someone was taking Zantac, Tums, and used dip, what would that mean?

The doctor, in his proffer, said that he would only be suspicious that a person had a gastroesophageal reflux disease. I believe that the challenges to the specific test, there needs to be some reliable indicia of a specific condition added with more probative evidence of a possible error in the test rather than an inference upon an inference, such as a roommate saying he uses Tums and Zantac and then an expert saying that that could be a suspicion of an acid reflux disease.

As has been told before on the record, I believe that if you were going to call a medical doctor to testify that your client experienced this condition, we would be able to examine on the record in the presence of the jury and

outside the presence of the jury to what level that condition affected this particular defendant. Counsel for the defendant has enumerated several conditions that he experiences and that they can be different for different defendants. Without any knowledge, scientific knowledge, with regard to this disease and specifically how it affects this defendant, I believe that the defense does not raise a **[260]** valid challenge to this specific test.

So as the evidence by Dr.—the proffered testimony as given by Dr. Staubus, I am not going to allow his testimony, because I do not feel, according to the case law, that it is—it meets the test of the Weese case and other Ohio law that I've looked at.

Are there any other issues before—Wait a minute. Also, there's a lot of proffered testimony that Dr. Staubus thinks that two tests ought to be given every time for every individual that takes the test, which has nothing to do with this case.

* * *

[267] Then the other question, it seems like the ruling is, I call Dr. Staubus, I just can't have him say anything that would help our case. I'm wondering whether that's a vain effort. If our entire testimony is what's in the proffer and none of it's allowed, then what's the point in even getting him down here or calling him? Cost my client $200 an hour to get him down here to say nothing.

Am I misunderstanding the Court's ruling, or am I pretty much on target?

THE COURT: I believe it's well-settled in Ohio that there are certain things that Dr. Staubus is allowed to **[268]** testify and there's other things that he is not allowed to testify. I think we've gone over them. I think that you are extremely well aware of those since you

were the attorney on the Weese case which set forth that law with regard to what an expert can and cannot testify to in this area. So if I need to restate the law on this, I will, however, I believe you're perfectly aware that he's not allowed to talk about general reliability, the fact that he believes that two tests need to be given in every case, and other such evidence that might put into question the reliability of the test.

* * *

[397] MS. SECKERSON: I wasn't positive. Your Honor, those I am just proffering.

And then I would move to admit the original exhibits from the motion hearing. And if I can have just one second to get the numbering on those.

And I believe Mr. Levering has probably already moved to admit these, but I'm not positive without checking the court file, so—or the transcript, so I'm going to move to admit those exhibits from the motion hearing, which **[398]** are State's Exhibits 1 through 18. And I guess we'll call the first three trial exhibits and the previous ones motion hearing exhibits.

THE COURT: I'm actually not sure if you moved to have those admitted or whether or not it was going to be stayed pending a decision by the Court.

Go ahead, Mr. Johnson.

MR. JOHNSON: I don't recall myself. Thanks, Judge. Yeah, I obviously have to object to all of these. Well, the posters, for purposes of identification, I don't care if they come in for that purpose. The general basis of our objection to all the documentary evidence was laid out in great detail in the previous filings in this case, and I won't belabor those points. I'll just incorporate that by

reference. But, generally, we think, because of the rubber stamp and other issues with regard to certificates, that the people doing what they were doing weren't authorized to do it, and therefore the documents and everything—every document prepared by people who weren't properly authorized shouldn't come into evidence.

There is, however, something of a new development along those lines that was not included in the brief. And the reason it wasn't included in the brief is because it wasn't the law then. The United States Supreme Court recently decided Crawford versus Washington dealing with [399] documentary evidence in criminal cases, and they said documentary evidence deprives the defendant of the right to cross-examination and that sort of thing. So we would list as an additional ground Crawford versus Washington. I actually do have the citation on that, I suppose I should read into the record as well. That is—It's a new case so there isn't a permanent one, but it's 72 United States Law Week 4229, and it was decided March 8, 2004. And the United States Supreme Court, I have not seen—oh, it's 124 Supreme Court 1354. There is a Supreme Court cite on that too.

* * *

[450] machines. The general reliability of breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence presented regarding the defendant's specific test and the specific machine used to test him.